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ABSTRACT

The Education of the Handicapped Act (EHA), as amended by the Education for All Handicapped Children Act (P.L. 94-142), reflects a long history of state and federal legislation and case law. One of the purposes of the act's revision is to ensure that a free appropriate public education is made available, in the least restrictive environment, to each handicapped child between the ages of 3 and 21. Literally hundreds of federal cases were filed during the late 1970s and early 1980s seeking judicial interpretation of both the content and the intent of the EHA. Only three of these cases, however, reached the Supreme Court: "Board of Education of the Hendrick Hudson Central School District v. Rowley" (1982); "Irving Independent School District v. Tatro" (1984); and "Smith v. Robinson" (1984). Each of these cases is summarized briefly in sections of this paper. A fourth section identifies future directions in this area based on precedents established by the Supreme Court in these three cases. Educational units will make a greater effort to guarantee that available due process procedures are both adequate and comprehensive; and many future controversies are now more likely to be settled in administrative hearings. As the EHA has been interpreted by the majority of the Supreme Court, the only handicapped children who will attempt to vindicate their rights in federal court are those who can afford legal action. (MLF)

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Interpreting the Education of the Handicapped Act: Recent Controversies and Future Directions

Stephen B. Thomas

The Education of the Handicapped Act (EHA), as amended by Public Law (PL) 94-142, reflects a long history of state and federal legislation and case law. Prior to the Act, most states had passed legislation opposing both discrimination against handicapped persons and the exclusion of handicapped children from public schools. State laws and agency regulations varied substantially, however, and enforcement generally was poor. Similarly, federal statutes provided inadequate guidance and enforcement, while funding also was limited. Given the reluctance of legislators, both state and federal, to pass comprehensive legislation and to establish an administrative machinery capable of enforcing related mandates, handicapped persons turned to the courts to acquire more timely relief from persons, organizations, and institutions that continued to discriminate against them.

From several of these early cases (1969-74) the position emerged that the functional exclusion of handicapped children from public schools was a violation of the fourteenth amendment to the federal Constitution. In addition, support for the rights of handicapped persons among constituent groups continued to grow during the same period. Political pressure peaked during 1974 and 1975 when steps were taken to ensure the passage of PL 94-142. This enactment was a complete revision of part B of the EHA. Although sections other than part B remained basically unchanged, the impact of the revisions to that part were so comprehensive that PL 94-142 has become known as the Bill of Rights for the education of handicapped children.

When Congress revised part B, it identified several purposes: to ensure that a free appropriate public education (FAPE) is made available, in the least restrictive environment to each handicapped child between the ages of three and twenty-one (section 1412(2)(B)) (except where state law, state practice, or court order restricts the participation of children aged three, four, five, eighteen, nineteen,

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twenty, or twenty-one); to guarantee that the rights of handicapped children are protected; to assist state and local units financially in providing appropriate programs; and to assess the effectiveness of efforts to provide appropriate programs. In meeting the stipulations of the Act, recipients are required to identify, locate, and evaluate all resident handicapped children; to develop an individual education program (IEP) for each handicapped child; to establish procedural safeguards; and to hold in confidence information and data used in evaluation and placement.

To be classified as *handicapped,* a child must be mentally retarded, hard of hearing, deaf, speech impaired, visually handicapped, seriously emotionally disturbed, orthopedically impaired, or other health impaired, or have a specific learning disability *and,* by reason thereof, require special education and related services (section 1401(1)). Accordingly, a child may possess a handicapping condition but may not be in need of special education and related services and, therefore, may not be identified as handicapped under the Act or be eligible for a FAPE.

A FAPE requires special education and related services that (1) are provided at public expense and are under public supervision and direction; (2) meet the standards of the state education agency; (3) include an appropriate preschool, elementary, or secondary education; and (4) conform with a child's IEP (section 1401(18)). *Special education* is defined as "specially designed instruction . . . to meet the unique needs of a handicapped child, including classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions" (section 1401(16)). *Related services* include transportation and such developmental, corrective, and other supportive services that are necessary to assist a handicapped child to benefit from a special education (section 1401(17)). Accordingly, a child would be eligible for related services, only if he were receiving special education.

Literally hundreds of federal cases were filed during the late 1970s and early 1980s seeking judicial interpretation of both the content and the intent of the EHA. Only three of these cases, however, reached the Supreme Court: *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982); *Irving Independent School District v. Tatro* (1984); and *Smith v. Robinson* (1984). Each of these cases is summarized briefly in the following sections of this chapter. Following these summaries is a fourth section where future directions are identified.

Board of Education of the Hendrick Hudson Central School District v. Rowley[1]

The first Supreme Court case interpreting the EHA was *Board of Education of the Hendrick Hudson Central School District v. Rowley*.[2] In that six-to-three Supreme Court decision, the plaintiff (Amy Rowley) was deaf, but was an excellent lipreader. In an effort to communicate with her and her deaf parents, local school administrators took a course in sign language interpretation, installed a teletype machine, and provided Amy with an FM hearing aid. The IEP prepared during Amy's first grade year stipulated that she be assigned to a regular first grade class and that she receive (1) tutorial instruction for one hour per day and (2) assistance from a speech therapist for three hours per week.

The parents accepted each of these provisions, but requested that Amy also have a sign language interpreter assigned to her when she attended academic classes. The district had provided an interpreter for a two week period while Amy was in kindergarten. This service was discontinued, however, based on information provided by the former interpreter and by the placement committee. The professionals working with the child concluded that she was not in need of such assistance and, at times, actually was distracted by the interpreter's presence.

Following the administrative decision not to provide an interpreter, the parents appealed to an impartial hearing officer. The officer ruled in favor of the district and observed that the plaintiff was achieving educationally, academically, and socially without such aid. On further appeal, the New York State Commissioner of Education affirmed the examiner's decision.

After exhausting administrative remedies, suit was filed in federal district court.[3] That court observed that Amy was remarkably well adjusted, that she interacted and communicated well with her peers, and that she maintained extraordinary rapport with her teachers. However, the court observed that, although Amy's performance in school was above average, she would have learned even more if she were not handicapped. This disparity between Amy's achievement and theoretical potential somehow led the court to conclude that a FAPE had not been provided and that a sign language interpreter was necessary. The Second Circuit Court of Appeals affirmed the

1. Portions of this chapter are derived from another NOLPE publication written by the same author, Stephen B. Thomas, Legal Issues in Special Education (1985).
2. 458 U.S. 176 (1982).
3. 483 F. Supp. 528 (S.D.N.Y. 1980).

decision,[4] and appeal was granted by the Supreme Court.

In its analysis, the Supreme Court majority reasoned that "if personalized instruction is being provided with sufficient supportive services to permit the child to benefit from the instruction, and other items on the definitional [FAPE] checklist are satisfied, the child is receiving a 'free appropriate public education' as defined by the Act."[5] According to the Court, federal law does not guarantee that individualized instruction will be sufficient to maximize a child's potential commensurate with the opportunities provided to other children,[6] or that handicapped children necessarily will learn; however, the IEP should be sufficient to confer *some educational benefit.* Furthermore, in determining whether an education is "appropriate," the Court restated the position that great deference should be given to the judgments of educators, and that courts should not substitute their own notions of sound educational policy for those of the school authorities.[7]

In supporting this interpretation of a FAPE, the Court rejected the position that the EHA was intended to provide *equal educational opportunity* for handicapped children and stated:

> Furnishing handicapped children with only such services as are available to nonhandicapped children would in all probability fall short of the statutory requirement of "free appropriate public education"; to require, on the other hand, the furnishing of every special service necessary to maximize each handicapped child's potential is, we think, further than Congress intended to go. Thus to speak in terms of "equal" services in one instance gives less than what is required by the Act and in another instance more. The theme of the Act is "free appropriate public education," a phrase which is too complex to be captured by the word "equal" whether one is speaking of opportunities or services.[8]

In conclusion, the Court noted that Amy was (1) being educated in the regular classroom; (2) receiving passing grades; and (3) advancing from grade to grade.[9] Accordingly, it reversed the lower court decision and ruled that the state had complied with the EHA.

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4. 632 F.2d 945 (2d Cir. 1980).
5. 458 U.S. 176, 189 (1982).
6. *Id.* at 186, referring to the position taken by the district court, 483 F. Supp. 528, 534 (S.D.N.Y. 1980).
7. 458 U.S. 176, 206 (1982).
8. *Id.* at 198-99.
9. *Id.* at 210.

Irving Independent School District v. Tatro

A second Supreme Court case involving the EHA is *Irving Independent School District v. Tatro*.[10] In that case, the plaintiff (Amber Tatro) had spina bifida and, as a result, suffered from orthopedic and speech impairments in addition to a neurogenic bladder. Amber was unable to voluntarily urinate and required clean intermittent catheterization (CIC) every three to four hours.

The local school district developed an IEP for the plaintiff which included early childhood development classes and physical and occupational therapy, but did not include CIC. As a result, the parents appealed the decision of the district through administrative channels, but were unsuccessful. They also were denied a preliminary injunction at the district court level,[11] where it was reasoned that CIC was not a related service because "it did not serve a need arising from the effort to educate."[12] Furthermore, the court proposed that section 504 was not violated, because the Rehabilitation Act (RA) does not require educators to provide health care for people who wish to participate in federally funded programs.

The Fifth Circuit Court of Appeals reversed the lower court decision[13] and held that CIC was a related service: it was necessary in order to permit the child to attend school and thereby benefit from special education. Accordingly, to deny such service was a violation of the EHA. Furthermore, because denying CIC services functionally excluded the plaintiff from public schools, a section 504 violation also was present. Following the establishment of these positions, the appeals court remanded the case to the district court.

On remand, the district court noted that because a doctor was not needed to administer CIC, it was not a medical service and, therefore, was not limited to diagnosis and evaluation. Accordingly, the school district was ordered to modify Amber's IEP to include CIC and to pay compensatory damages; furthermore, because section 504 also was violated, attorney's fees were awarded. The Fifth Circuit affirmed this decision,[14] and appeal was granted by the Supreme Court.

In arriving at its conclusions, the High Court made several relevant observations: a child must be handicapped to receive special education and, therefore, to be eligible for related services; only those services which are necessary to aid a handicapped child to benefit from special education must be made available; CIC is not a medical

10. 703 F.2d 823 (5th Cir. 1983), *rev'd in part*, 104 S. Ct. 3371 (1984).
11. Tatro v. Texas, 481 F. Supp. 1224 (N.D. Tex. 1979).
12. *Id.* at 1227.
13. Tatro v. Texas, 625 F.2d 557 (5th Cir. 1980) (Tatro I).
14. Tatro v. Texas, 703 F.2d 823 (5th Cir. 1983) (Tatro II).

service which must be provided by a licensed physician; related services include school health services which are provided by a qualified school nurse or other qualified person; and CIC can be a supportive service which is necessary for a child to benefit from special education. Given these positions, the Court ordered the school district to provide Amber with CIC because, for her, such service was found to be necessary if she were to attend school and benefit from special education; however, attorney's fees were not required, because section 504 is not applicable where relief is available under the EHA.

Smith v. Robinson

In *Smith v. Robinson*, the plaintiff (Tommy Smith) suffered from cerebral palsy and a variety of physical and emotional handicaps.[15] The district had placed him in a hospital day program but withdrew funding after eleven months of services, claiming that the State Division of Mental Health, Retardation, and Hospitals was responsible for educating emotionally disturbed children. (This position later was rejected by the Rhode Island Supreme Court.) The plaintiffs appealed the superintendent's decision to cease funding and filed a complaint in federal district court. The complaint was amended and supplemented on several occasions and included constitutional, RA, and EHA violations. By the time the complaint reached the Supreme Court, the primary question was whether attorney's fees could be awarded under either the fourteenth amendment or the RA in a proceeding to secure a FAPE for a handicapped child.

Fourteenth Amendment

Where due process or equal protection rights are violated by state officials, 42 U.S.C. section 1983 authorizes suits to redress violations; furthermore, 42 U.S.C. section 1988 permits the awarding of attorney's fees.[16] As a general rule, a prevailing plaintiff recovers fees unless "special circumstances render such an award unjust,"[17] even if the constitutional claim was never addressed, and even if the statutory claim on which the plaintiff prevailed is one for which fees cannot be awarded under that Act.[18] If this were not the situation, plaintiffs would be penalized in each case where a nonconstitutional

15. 703 F.2d 4 (1st Cir. 1983), *aff'd*, 104 S. Ct. 3457 (1984).

16. *See* Maine v. Thiboutot, 448 U.S. 1 (1980); Hutto v. Finney, 437 U.S. 678 (1978).

17. Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 402 (1968). In *Newman*, the Court also noted that "[i]f successful plaintiffs were routinely forced to bear their own attorney's fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts," at 402.

18. Maher v. Gagne, 448 U.S. 122, 132 n.15 (1980).

claim was dispositive.[19] However, fees may not be awarded where the work done was on a claim in which a plaintiff did not prevail and which involved distinctly different legal theories from the successful claim.[20]

In the *Smith* case, the plaintiff was not provided a full hearing prior to terminating funding and, as a result, was able to obtain an injunction to prevent a *due process* violation. The lower court required the local board to pay the attorney's fees that were incurred in obtaining the injunction; this award, however, was not challenged on appeal and the Supreme Court majority "assumed" that it was proper. Nevertheless, the Court was quick to note that simply because fees were justified for the initial due process violation did not mean that the plaintiffs were entitled to fees for all subsequent administrative and judicial proceedings.[21]

In fact, the majority ruled that the EHA, where applicable, was intended to be the exclusive avenue through which a plaintiff may assert an *equal protection* claim to a FAPE.[22] Otherwise, plaintiffs challenging provisions of a FAPE could go directly to federal court under section 1983, rather than exhaust the administrative appeals required by statute. The majority opined that Congress apparently had felt that local and state educational units should not be burdened with attorney's fees for successful plaintiffs, assuming that litigants were provided with the "process they were constitutionally due."[23] Accordingly, if a district wanted to avoid possible fourteenth amendment and related 1983 and 1988 suits, it must ensure that existing due process procedures are adequate.

Rehabilitation Act

In addition to the fourteenth amendment, plaintiffs also have sought relief under section 505 of the RA, which provides for the award of attorney's fees where circumstances warrant. Section 504 of the RA provides that "[n]o otherwise qualified handicapped individual in the United States ... shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving [f]ederal financial assistance .... "

Although this statute has a broad reach, its application has been delimited by the Court to situations were the RA and the EHA are

19. Smith v. Robinson, 104 S. Ct. 3457, 3460 (1984).
20. *Id.*
21. *Id.* at 3467.
22. *Id.*
23. *Id.* at 3470 n.17.

not coextensive. In support of this position, the Court said that the significant difference between the two statutes (the RA and the EHA) is that the rights assumed to be guaranteed by both are specifically required only by the EHA.[24] Furthermore, the general antidiscrimination provisions of section 504 do not require affirmative action on behalf of handicapped persons; they require only that recipients of federal financial assistance not discriminate based on handicap. Based on these findings, the Court ruled that "[w]here section 504 adds nothing to the substantive rights of a handicapped child, we cannot believe that Congress intended to have the careful balance struck in the EHA upset by reliance on section 504 for otherwise unavailable damages or for an award of attorney's fees."[25] Accordingly, in cases where provision of an EHA-based FAPE is disputed, relief is not available under the RA.

Future Directions

Given the precedents established by the Supreme Court in the above cases, a number of changes are likely to occur within educational units which provide for the needs of handicapped children. It is clear that the Court has and will continue to show great deference for the expertise of educators in identifying, evaluating, and placing handicapped children. If parents are unsatisfied with related decisions, they have the right to seek independent evaluations, and to appeal such decisions to impartial hearing officers, state reviewers, and courts. However, the Supreme Court has concluded that in FAPE-related cases, specific EHA procedures are not to be circumvented (e.g., by resort to section 1983 or section 504 suits), while available relief is restricted only to that provided under the EHA. Possible awards include injunctive relief and, according to selected federal circuit courts, monetary damages in exceptional circumstances.[26]

During the next several years, there should be a greater effort to guarantee that available due process procedures are both adequate and comprehensive. Where parents have not been notified of their rights, where initial hearings are not given, and where administrative appeals are not available, educational units will not be providing "the process that is due," and will be forced to respond to injunctions

24. *Id.* at 3472.

25. *Id.* at 3474.

26. *See, e.g.*, Anderson v. Thompson, 658 F.2d 1205 (7th Cir. 1981), where two exceptional circumstances were identified: (1) where there was a risk to the child's physical health; and (2) where the educational unit acted in bad faith by failing to comply with the procedural provisions of the EHA in an egregious fashion.

and possibly to pay attorney's fees. As a result, districts are likely to provide additional assurances to both parents and courts that disputes will be settled fairly and timely. The use of mediators is likely to expand in an effort to provide timely action and to reduce the cost and number of impartial hearings. Furthermore, time limits are likely to be more rigidly adhered to than in past years.

Notwithstanding such improvements in providing for due process, precedents established in these Supreme Court cases may reduce the probability that handicapped children who have not been provided with a FAPE may acquire relief in federal courts. Parents who feel that an appropriate program has not been provided, and who have been unsuccessful in administrative appeals, must decide whether it is financially advisable to pursue their claim in the courts. Depending on the nature of the controversy, attorney's fees could be larger than any relief which may be awarded. Justice Brennan, in his dissenting opinion in *Smith*, noted this paradox and stated that "[i]t is at best ironic that the Court has managed to impose [the liability of attorney's fees] on handicapped children in the course of interpreting a statute wholly intended to promote the educational rights of those children."[27] He suggested that the conflict between the EHA, on the one hand, and section 504 and section 1983, on the other, is simply to "require a plaintiff with a claim covered by the EHA to pursue relief through the administrative channels established by that Act before seeking redress in the courts under section 504 or section 1983."[28] He noted that "[u]nder this resolution, the integrity of the EHA is preserved entirely, and yet sections 504 and 1983 are also preserved to the extent that they do not undermine the EHA."[29] (Justice Brennan's position regarding this issue is shared only by two other members of the Court — Justices Marshall and Stevens.)

Many future controversies regarding such issues as the scope and availability of related services, the availability of extended year schooling, the use of information obtained in a parent-financed evaluation, the assessibility of programs, and the appropriateness of IEPs are now more likely to be settled in administrative hearings. Although hearings have a definite appeal, it is unfortunate that they will result from the lack of affordable judicial alternatives, rather than from the desire of educators and parents to work together in identifying and providing for the educational needs of handicapped children.

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27. Smith v. Robinson, 104 S. Ct. 3457, 3479 (1984) (Brennan, J., dissenting).
28. *Id.* at 3475.
29. *Id.*

As the EHA has been interpreted by the majority of the Supreme Court, the only handicapped children who will attempt to vindicate their rights in federal court are those who can afford legal action and who, on balance, will profit from such action; unfortunately, others will lose. Such practice may favor public coffers, but that advantage is at the expense of those who are least able to shoulder an additional court-imposed burden.